

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT
STATE SERVICES FOR THE BLIND

In the Matter of the Appeal of
Gina Munnelly

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge (ALJ) M. Kevin Snell on June 25, 2012, at the Office of Administrative Hearings, 600 North Robert Street, Saint Paul, Minnesota. The hearing record closed on July 5, 2012, upon receipt of post-hearing submissions.¹

Jackson Evans, Assistant Attorney General, St. Paul, Minnesota, appeared at the hearing on behalf of the Department of Employment and Economic Development (the Department), State Services for the Blind (SSB). Appellant, Gina Munnelly, appeared on her own behalf without legal counsel.

STATEMENT OF THE ISSUE

Did SSB err in denying Appellant's request that SSB provide Appellant with an Active Braille Display?

The Administrative Law Judge concludes that SSB erred in denying Appellant's request that SSB provide her with an Active Braille Display.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Appellant's History

1. Appellant was born in India and was abandoned to the streets as a young child. Due to severe malnutrition, her right eye had to be removed. After removal of scar tissue over her left eye, very limited sight remained in her left eye. Appellant was adopted into and raised by a family in Elk River, Minnesota.²

¹ Minn. Stat. § 14.58. Minnesota Statutes are cited to the 2010 Edition.

² Testimony of Gina Munnelly.

2. Appellant can read and write print with a magnifying glass. She is also a proficient Braille reader and writer, and has been reading Braille since kindergarten.³

3. Appellant graduated from Elk River High School. She earned a Bachelor's degree in family social science and communications studies from the University of Minnesota. Appellant earned a Master's degree in counseling and psychology from Adler Graduate School in 2010.⁴

4. Appellant currently makes her living as: an assistive technology trainer; a motivational speaker; and singer. As an assistive technology trainer, Appellant goes to the homes of clients and teaches them how to use computers and software. She utilizes targeted technology assessments to assess the specific needs of her clients.⁵

Appellant and State Services for the Blind

5. Appellant and SSB have been working together for approximately ten years. This relationship has been cooperative and very positive. Prior to the issue in this proceeding, there have been no disputes about the appropriateness of the services previously provided by SSB to Appellant.⁶

6. SSB is not operating under an "order of selection" caused by a shortfall of grant funds that would require prioritization of provision of SSB services to qualified individuals.⁷

Portable Braille Displays/Note Takers

7. Appellant currently utilizes a Brailino Braille display reader and note taker.⁸ The Brailino is nearing the end of its technological life cycle. Applicant's Brailino needs to be upgraded or replaced.⁹

8. Braille represents sight-printed characters by using small rectangular blocks called cells that contain small raised dots. It is the number and arrangement of these dots within each cell that designates the letter, character or number a given cell represents. An electronic Braille reader or note taker utilizes a fixed number of cells containing dots that raise and lower as the reader moves his or her fingers over the cells. The cells are lined up on the reader in a fashion similar to the keyboard of a computer. Once the reader has "read" all of the cells, the dots need to be refreshed, or rise up again, with the new characters or numbers.¹⁰

³ Test. of G. Munnelly and Ex. 1.

⁴ Test. of G. Munnelly.

⁵ *Id.*; Test of David Tanner, Assistive Technology Specialist for SSB.

⁶ *Id.*; Test. of Natasha Lemler, Lead Rehabilitation Counselor for SSB.

⁷ Test. of N. Lemler; Conclusion 7.

⁸ Test. of G. Munnelly.

⁹ Test. of D. Tanner.

¹⁰ *Id.*; Test of G. Munnelly and Earl Harrison, owner of Triumph Technology and Handi-Tech distributor.

9. There are two Braille displays that were considered by SSB and Applicant to replace Applicant's Brailino. One is the Edge Braille display. The other is the Active Braille display. The Active is a newer generation of the Brailino, manufactured by the same company¹¹ and containing the same command structure.¹²

10. The refresh feature is accomplished in the Edge display by utilizing a finger or thumb to tap a button at the end of the row of cells to refresh them. The refresh feature is accomplished in the Active display automatically when the reading finger(s) reach the end of the row of cells.¹³

11. To read a document with 600,000 Braille characters, one will need to press the refresh button 40,000 times on a 20 cell Braille reader, such as the Brailino, or 20,000 times on a 40 cell Braille reader such as the Edge.¹⁴

Appellant's Individualized Plan for Employment (IPE)

12. SSB is required to conduct an assessment for determining vocational rehabilitation needs for eligible individuals. The purpose of this assessment is to determine the employment outcome, and the nature and scope of vocational rehabilitation services to be included in the IPE. The IPE must be designed to achieve a specific employment outcome, consistent with federal law, that is selected by the individual consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.¹⁵ The draft of the seventh amendment to Appellant's IPE, scheduled to begin 6/11/2012, provides in relevant part as follows:

Job Goal: Self-Employment: Workshop Presenter (Counseling and Psychology)

Activities/Services

1. Obtain LPCC¹⁶ and LMFT¹⁷ credentials:

. . .

3. Assistive Technology Maintenance or Updating (as recommended by technologist)

¹¹ *Id.*; Ex. 28 - Handy Tech Electronic GmbH of Horb Germany.

¹² Test of D. Tanner, G. Munnelly and E. Harrison.

¹³ *Id.* A crude analogy for sighted persons to understand the difference in advancing lines between the Edge and the Active would be the difference between the use of an electric typewriter, where one must hit the return key to change a line, and the use of a computer word processor where the lines flow automatically and return without hitting the Enter key.

¹⁴ Ex. 28.

¹⁵ Conclusions 6, 9, 12-17.

¹⁶ Licensure as a Licensed Professional Clinical Counselor; Test. of G. Munnelly.

¹⁷ Licensure as a Licensed Marriage and Family Therapist; Test. of G. Munnelly.

Service Provider: AT Company

... **Are there comparable services or benefits?** Yes -
Warranties¹⁸

13. Applicant's job goal as a self-employed workshop presenter, therapist and counselor is targeted for human services audiences such as therapists, social workers, psychologists, psychiatrists, and graduate students for self care. The objectives of Applicant's self care seminars are to encourage them and give them the tools to take care of themselves and prevent "burn-out."¹⁹

14. The Executive Summary of Applicant's Business Plan, taken from her Master's Thesis, provides as follows:

Self care in the human services field is an emerging issue. The author asserts that it is a hidden treasure that every professional needs to discover about themselves. It is crucial to the emotional health and psychological well being of the helping professional. This subject is underdeveloped and misunderstood among the practitioners themselves. In one study (Mahoney, 1997) authors found that therapist's attitudes toward their own self care were indifferent. The aim of this thesis will be to explore the various aspects that hinder healthy self care. The article will look at consequences of therapists' chronic lack of integrated self care such as: compassion fatigue, secondary traumatization, vicarious traumatization and burnout. This paper will define and explore what healthy self care actually is. Finally, we will move to the discussion of how students from the Adler Graduate school perceive their own self care and the issues that surround it. Questions about self care and strategies to improve it will be discussed.²⁰

15. In furtherance of Appellant's IPE and Business Plan, SSB has approved and purchased a number of supplies and technologies since January 1, 2012. SSB has approved, but not yet purchased four hardware and software items. There are four items in the discussion stage, one of which is the appropriate Braille reader for the upgrade of Applicant's Brailino.²¹

16. SSB and Appellant disagree on one item: whether it is the Edge or the Active Braille display that is necessary for Appellant to successfully launch her business of providing seminars to mental health professionals on the topic of self care. Appellant has requested that SSB provide her with an Active Braille display.²²

¹⁸ Ex. 1.

¹⁹ Test. of N. Lemler; Ex. 4.

²⁰ Ex. 4.

²¹ Test. of N. Lemler; Ex. 7.

²² Test. of G. Munnelly, N. Lemler, and D. Tanner; Ex. 6.

SSB's 2011 Technology Evaluation

17. Ms. Lemler, Appellant's SSB counselor, referred Appellant to Mr. David Tanner, an SSB Assistive Technology Specialist, for an exploratory technology evaluation. He did not conduct a targeted evaluation. Mr. Tanner is totally blind. He has made presentations to many groups of people and organizations. Mr. Tanner utilizes a Brailino for his presentations. He inputs only an outline into his Brailino for his presentations.²³

18. Mr. Tanner met with Appellant once for an exploratory technology evaluation in November or December of 2011. He learned that Appellant utilized a Brailino and informed her that he had done many presentations with a Brailino. He also informed her that her Brailino needed to be upgraded to utilize Bluetooth[®] technology. Although the Active Braille reader came onto the open market in the fall of 2011, Appellant was unaware of either the Active or Edge, or their features at the time of the meeting. The Edge reader came onto the open market in April 2012.²⁴

19. Appellant learned about the Active Braille display and its features from Triumph Technologies in her capacity as an assistive technology trainer with one of its government customers. Appellant has been working with the company since 2005 or 2006 with regard to vision loss resources.²⁵

20. In March 2012, Mr. Tanner recommended to Ms. Lemler that Appellant could accomplish her occupational goals with the use of an Edge Braille display rather than an Active Braille display because:

- a. Appellant should only utilize an outline of her presentations because that is what he does;
- b. Reading an entire presentation would bore the audience because they would become disinterested;
- c. Given the extra expense of an Active, Appellant having the automatic advance or refresh feature would be unnecessary for Appellant in light of her skills.²⁶

21. Mr. Tanner made his recommendation to Ms. Lemler for the Edge without:

- a. observing Appellant read Braille;
- b. hearing her conduct a seminar presentation; or

²³ Test. of D. Tanner.

²⁴ Ex. 3.

²⁵ Test. of E. Harrison.

²⁶ Ex. 5; Test. of D. Tanner.

c. reviewing Appellant's business plan.²⁷

22. Mr. Tanner would change his recommendation if it was justified.²⁸

23. Ms. Lemler determined that the Edge Braille reader was adequate for Appellant, based on Mr. Tanner's recommendation and the reduced cost of the Edge.²⁹

24. Both Mr. Tanner and Ms. Lemler concluded that one particular feature of the Active Braille display – the automatic advance/refresh capability – was the only material difference between the Active and the Edge. They concluded that the automatic advance/refresh feature was unnecessary for Appellant to achieve her IPE goal, without consideration of the other unique features of the Active or Appellant's unique reading and note taking needs, presentation style, and capabilities as a seminar presenter.³⁰

25. At no time prior to the hearing did Ms. Lemler, Mr. Tanner and Appellant actually meet together to discuss Appellant's needs in a Braille reader or see her demonstrate her use of an Active Braille reader in a seminar-type situation.³¹

Features of the Active that the Edge Does Not Possess

26. Both the Active and the Edge Braille readers have 40 cells, where the Brailino has 20 cells. The number of cells determines the number of Braille characters available to read before all of the cells need to be refreshed.³²

27. Both the Active and the Edge have carrying cases. However, the Active display has a shoulder strap and the unit can actually be read when it is in the carrying case and the user is walking. The Edge has no shoulder strap and cannot be used when it is in its case.³³

28. The retail price of the Edge is \$2,995.00. The retail price of the Active is \$6,450.00.³⁴ The Edge is manufactured in South Korea. The Active is manufactured in Germany.³⁵ The difference in price is due to the applicable currency exchange rates.³⁶

29. In addition to the auto-advance feature and the carrying case, the Active has the following additional features that the Edge does not:

a. Ergonomic, concave cells that are curved to human fingertips;

²⁷ *Id.*

²⁸ Test. of D. Tanner.

²⁹ Test. of N. Lemler.

³⁰ *Id.*; Test of D. Tanner.

³¹ *Id.*; Test of G. Munnelly.

³² Test. of G. Munnelly, D. Tanner; and E. Harrison.

³³ Test. of G. Munnelly and E. Harrison.

³⁴ Test. of N. Lemler, and E. Harrison.

³⁵ Test. of E. Harrison.

³⁶ *Id.*

- b. Ergonomic keyboard with keys spread out rather than in a straight line. Studies show that ergonomic cells and keyboards reduce finger reading fatigue;
- c. User replaceable batteries. The Active has two battery compartments, each containing two rechargeable AA batteries. The Edge must be sent to the Korean manufacturer for battery replacement;
- d. The internal command structure is the same as the Brailino; and
- e. Built-in software allowing wireless file transfer to a computer within Bluetooth range. The Edge file transfer protocol is cumbersome.³⁷

30. SSB has purchased Active Braille display for two eligible individuals. SSB has purchased Edge Braille displays for three eligible individuals.³⁸

31. SSB can purchase an Active demonstration model from Triumph Technology for \$4,500.00.³⁹ Triumph Technology is a distributor for both the Active and the Edge, and is a vendor of those products for SSB.⁴⁰

Appellants Unique Strengths, Priorities, Concerns, Abilities, Capabilities, Interests, and Informed Choice

32. Appellant reads volumes of technical material when preparing for her seminars. Appellant inputs detailed empirical research and quotes that she needs to have available to her as she reads from a Braille display and moves about during her presentations. The ergonomic keyboard and cells reduce her finger fatigue in the preparation process.⁴¹

33. Appellant utilizes a dynamic and interactive style when speaking to her sighted audiences. She gestures with her hands, reads from the display, utilizes a microphone and changes PowerPoint slides – all while moving around at the head of her audience. Appellant is too petite to stand behind a podium and be seen. Also, standing in a fixed location is contrary to her presentation style, energy level, and personality.⁴²

34. Keeping the audience engaged is essential in Appellant's presentations. In order to keep pace with her active style, the automatic advance/refresh feature is necessary to avoid awkward pauses during her presentations that would be caused by

³⁷ *Id.*

³⁸ Test. of N. Lemler and E. Harrison.

³⁹ Test. of G. Munnelly.

⁴⁰ Test. of E. Harrison.

⁴¹ Test. of G. Munnelly.

⁴² *Id.* The ALJ also observed her demonstration of these abilities while she utilized an Active Braille display during the hearing.

an Edge. This could be caused by having to move a thumb up to advance the cells and possibly be sent back to the beginning of the presentation that is stored in the display.⁴³

35. Having user replaceable batteries is necessary for Appellant's seminar business to stay functionally seamless. She can carry extra alkaline batteries with her and replace the rechargeable batteries in the event of a failure.⁴⁴ This type of backup is not available with the Edge, as the unit must be sent to the Korean manufacturer for battery replacement in the event of a battery failure.⁴⁵

36. Appellant is confident, bright, and absorbs and retains information well. She is a talented assistive technologist.⁴⁶

37. The Active Braille reader is Appellant's best opportunity to succeed in her business. The Active is the only Braille reader that will allow Appellant to do what she needs to do.⁴⁷

Additional Findings

38. Appellant submitted an informal appeal to the Supervisor of the SSB Business Enterprises Program. She requested that he contact Mr. Earl Harrison of Triumph Technology, SSB's vendor of both the Edge and the Active for additional information about why she needed the Active rather than the Edge. He declined, stating that he only had to talk to the SSB Assistive Technology Specialist.⁴⁸

39. On May 30, 2012, the SSB Supervisor upheld the decision of Appellant's SSB counselor, whose decision was based on the recommendation of the SSB Assistive Technology Specialist.⁴⁹

Procedural Findings

40. On March 27, 2012, SSB denied Appellant's request that SSB provide her with an Active Braille Display.⁵⁰

41. Appellant made a timely request for a contested case hearing on May 8, 2012.⁵¹

⁴³ Test. of E. Harrison and G. Munnelly.

⁴⁴ Test. of E. Harrison.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Test. of G. Munnelly.

⁴⁹ Ex. 6.

⁵⁰ Ex. 1 to the Notice and Order for Hearing and Prehearing Conference.

⁵¹ Ex. 20.

42. On May 15, 2012 the SSB issued a Notice and Order for Hearing and Prehearing Conference. The prehearing conference was set for and held on May 23, 2012.⁵²

43. In accordance with the agreements reached during the Prehearing Conference, an ALJ issued a First Prehearing Order on May 29, 2012, setting the contested case hearing on for June 25, 2012.⁵³

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

Jurisdiction

1. The Administrative Law Judge and the Commissioner of The Department of Employment and Economic Development have authority to consider and rule on the issues in this contested case proceeding pursuant to: 29 U.S.C. § 722(5)(J); 34 C.F.R. § 361.57 (2010); Minn. Stat. §§ 14.50, 248.07, and 268A.03; Minn. R. 3325.0490.⁵⁴

2. The Department gave proper and timely notice of the hearing and has fulfilled all procedural requirements of law and rule.

Burden of Proof

3. The Appellant has the burden of proof to show by a preponderance of the evidence that the Active Braille Display is her informed choice and is necessary for Appellant to achieve her individual employment outcome as an educational seminar presenter to health care professionals.⁵⁵

Purpose of the Rehabilitation Act and the Minnesota Vocational Rehabilitation Services Program

4. The purpose of the federal Rehabilitation Act, as amended, is to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society.⁵⁶

5. The purpose of the State Vocational Rehabilitation Services Program is to provide grants to assist states in operating statewide comprehensive, coordinated, effective, efficient, and accountable programs, each of which is . . .

designed to assess, plan, develop, and provide vocational rehabilitation services for individuals with disabilities, consistent with their strengths,

⁵² Notice and Order for Hearing and Prehearing Conference.

⁵³ First Prehearing Order.

⁵⁴ Minnesota Rules are cited to the 2011 Edition.

⁵⁵ 29 U.S.C. § 722(5)(J); Minn. R. 1400.7300, subp. 5.

⁵⁶ 29 U.S.C. § 701(b).

resources, priorities, concerns, abilities, capabilities, interests, and informed choice, so that they may prepare for and engage in gainful employment.⁵⁷

Requirements of an Individualized Plan for Employment

6. 34 C.F.R. § 361.45 (b) regarding the development of the individualized plan for employment, requires, in applicable part:

(1) The designated State unit must conduct an assessment for determining vocational rehabilitation needs, if appropriate, for each eligible individual or, if the State is operating under an order of selection, for each eligible individual to whom the State is able to provide services. The purpose of this assessment is to determine the employment outcome, and the nature and scope of vocational rehabilitation services to be included in the IPE.

(2) The IPE must be designed to achieve a specific employment outcome, as defined in §361.5(b)(16), that is selected by the individual consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

7. At the times relevant to this proceeding, SSB was not “operating under an order of selection.”⁵⁸ Therefore, the additional cost of an Active Braille Display when compared to the Edge Braille Display is not a factor that may be considered at this time.⁵⁹

8. SSB is the designated state unit that is responsible for all decisions affecting eligibility for vocational rehabilitation services, the nature and scope of available services, and the provision of those services to individuals who are blind or visually handicapped.⁶⁰

Eligibility for Vocational Rehabilitation Services

9. Under federal law, an individual is eligible for vocational rehabilitation services if the individual has a disability as defined in the Rehabilitation Act and requires vocational rehabilitation services to prepare for, enter, engage in, or retain gainful employment.⁶¹

10. An “individual with a disability” means any individual who has a physical or mental impairment which for such individual constitutes or results in a substantial

⁵⁷ 34 C.F.R. 361.1; Minn. R. 3325, subp. 19a.

⁵⁸ Finding 6.

⁵⁹ Conclusions 6 and 22.

⁶⁰ 34 C.F.R. § 361.13(c); Minn. R. 3325.0100.

⁶¹ 29 U.S.C. § 722(a)(1).

impediment to employment and can benefit in terms of an employment outcome from vocational rehabilitation services.⁶²

11. Appellant is an individual with a visual disability for purposes of 29 U.S.C. §705(20)(A), 34 C.F.R. § 361.5(b)(28) and Minn. R. 3325.0130. Appellant is therefore eligible for vocational rehabilitation services.

Requirement of an Individualized Plan for Employment (IPE)

12. An IPE must include a description of the specific employment outcome as chosen by the eligible individual that is consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, career interests, and informed choice, and a description of the specific rehabilitation services that are needed to achieve the employment outcome.⁶³

13. The IPE must be signed by the eligible individual and approved and signed by a qualified vocational rehabilitation counselor employed by the designated state unit.⁶⁴

14. The IPE must be reviewed at least annually by a qualified vocational rehabilitation counselor and the eligible individual or, as appropriate, the individual's representative to assess the eligible individual's progress in achieving the identified employment outcome.⁶⁵

15. The IPE must be amended as necessary by the individual in collaboration with the state's vocational rehabilitation counselor if there are substantive changes in the employment outcome, the vocational rehabilitation services to be provided, or the providers of the vocational rehabilitation services.⁶⁶

16. Amendments to the IPE do not take effect until agreed to and signed by the eligible individual or, as appropriate, the individual's representative and by a qualified vocational rehabilitation counselor employed by the designated state unit.⁶⁷

17. Although a written plan is created with the involvement of the individual with a disability, the counselor makes the final decision concerning the scope of services provided.⁶⁸

Standards Applicable to Assistive Technology and Occupational Equipment

18. Federal law defines an Assistive Technology Device as:

⁶² 29 U.S.C. § 705(20)(A).

⁶³ 34 C.F.R. § 361.46 (a); Minn. R. 3325.0110, subp. 29; Minn. R. 3325.0170, subp. 2.

⁶⁴ 29 U.S.C. § 722 (b)(2)(c); 34 C.F.R. § 361.45 (3); Minn. R. 3325.0170, subp. 1.

⁶⁵ 34 C.F.R. § 361.45(d)(5); Minn. R. 3325.0170, subp. 4.

⁶⁶ 34 C.F.R. § 361.45(d)(6); Minn. R. 3325.0170, subp. 5.

⁶⁷ 34 C.F.R. § 361.45(d)(7).

⁶⁸ *In re Appeal of Wenger*, 504 N.W.2d 794, 798 (Minn. App. 1993), *citing Buchanan v. Ives*, 793 F. Supp. 361, 366 (D. Maine 1991).

any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of an individual with a disability.⁶⁹

19. The Active Braille Display is an assistive technology device that will increase and improve the functional capabilities of Appellant as a presenter of workshops in counseling and psychology.⁷⁰

20. SSB is obligated to provide certain services, including occupational tools and equipment.⁷¹

21. The Active Braille Reader is an occupational tool or equipment.⁷²

Non-Applicability of Comparable Services

22. Minn. R. 3325.0430 regarding the comparison of services, provides in applicable part:

Subpart 1. **Scope.** Comparable services and benefits that would contribute toward and not interfere with an eligible individual's vocational rehabilitation must be used if available to an eligible individual or members of an eligible individual's family for all rehabilitation services identified in the eligible individual's IPE **except:**

. . .
E. job-related services; . . .

23. Job related services, such as assistive technology and occupational equipment are not subject to the requirements of subpart 1 regarding use of comparable services.

Conditions for the Provision of Services

24. Minn. R. 3325.0420, subp. 2 B, regarding the conditions for SSB to provide services, provides in applicable part:

Subject to . . . informed choice, SSB must ensure that each eligible individual receives **only the available rehabilitation services necessary** to enable the eligible individual to achieve the eligible individual's employment . . . outcome. (emphasis added)

⁶⁹ 34 C.F.R. § 361.5 (b)(7).

⁷⁰ Findings.

⁷¹ Minn. R. 3325.0180, I.

⁷² *Id.*; Ex. 22.

The Active Braille Display is Necessary for Appellant

25. The Active Braille Display is Appellant's informed choice.⁷³

26. The Edge Braille display would impede Appellant's ability to achieve her individual employment outcome: conducting effective educational seminars on self-care to health care professionals.

27. Appellant has proved by a preponderance of the evidence that the Active Braille Display is necessary for Appellant to achieve her individual employment outcome as an educational self-care seminar presenter to health care professionals.

Financial Participation by Applicant

28. SSB is precluded from requiring Appellant to financially participate in its provision of job-related services. Therefore, SSB is precluded from requiring Appellant to participate in covering the cost of upgraded occupational equipment or occupational assistive technology – in this case, the Active Braille Display.⁷⁴

29. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions and adopts as Findings any Conclusions that are more appropriately described as Findings.

30. The bases and reasons for these Conclusions are those expressed in the Memorandum that follows, and the Administrative Law Judge incorporates that Memorandum into these Conclusions.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends that the decision of SSB be reversed and that the Commissioner direct that SSB provide Appellant with an Active Braille Display.

Dated: July 27, 2012

s/M. Kevin Snell

M. KEVIN SNELL

Administrative Law Judge

Reported: Digitally recorded
No transcript prepared

⁷³ Finding 16.

⁷⁴ Minn. R. 3325.0440, subp. 1C.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Department of Employment and Economic Development (the Commissioner) will make the final decision after a review of the record. A party who is dissatisfied with this report may request a review within 20 calendar days of the mailing of the report. The Commissioner must provide both parties with an opportunity to submit additional evidence and information relevant to his decision concerning this matter. The review must be conducted by the Commissioner, who may not delegate the review to any employee of SSB. The Commissioner may not overturn or modify this report, or any part of it, that supports the position of the Appellant unless the Commissioner concludes, based on clear and convincing evidence, that the report is clearly erroneous on the basis of being contrary to the approved state plan, federal law and regulations, or state rules and policies that are consistent with federal requirements.

The Commissioner must make an independent, final decision within 30 calendar days of the request after reviewing the entire hearing record and provide a decision in writing, including a full report of the findings and the statutory, regulatory, or policy grounds for the decision to both parties. Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve his final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

The Commissioner's decision is final unless either party disagrees and brings a civil action, in which case the Commissioner's decision must be implemented pending review by the court. Any party dissatisfied with the Commissioner's decision after reviewing his report may bring a civil action with respect to the matter in dispute in any state court of competent jurisdiction or district court of the United States of competent jurisdiction, as provided in Code of Federal Regulations, title 34, section 361.57 (i).

Parties should contact Mark Phillips, Commissioner, Department of Employment and Economic Development, 332 Minnesota Street, Suite E-200, Saint Paul, MN, 55101-1351, (651) 259-7114, to learn the procedure for filing exceptions, additional evidence and information, and presenting argument.

MEMORANDUM

Burden of Proof

SSB argues that Appellant has the burden of proving that SSB abused its discretion in denying her request for an Active Braille Display. This argument is correct in part and incorrect in part. SSB is correct in arguing that Appellant has the burden of proof. However, the applicable standard in this proceeding is a preponderance of evidence.⁷⁵ An abuse of discretion standard is applied by an appellate level tribunal in its review of a final agency decision, not in a *de novo* administrative level contested

⁷⁵ Conclusion 3.

case. If a party appeals the Commissioner's final decision in this proceeding, the abuse of discretion standard may apply.

Requirement of Necessity

Appellant has proved by a preponderance of the evidence that the Active Braille Display is a necessity for her to have an adequate opportunity for success in her career choice. The Active has several necessary features that the Edge does not.⁷⁶

Five of those features are essential for her career as a seminar presenter.⁷⁷ First, the automatic advance feature, combined with the portability provided by its carrying case, are necessities because it allows her to follow along with her interactive oral presentations in a fashion that keeps her pace brisk – thereby maintaining the interest of the audience. Third, those features also permit her to walk around in front of the audience while having access to the information contained in the Active with one hand and allowing her to gesture and advance a PowerPoint presentation with the other. Fourth, contrary to the belief of SSB, Appellant reads a great deal and the ergonomic features of the Active will prevent physical fatigue. Fifth, the availability of user battery backup is also an essential feature. These features are necessary, chosen by Appellant, and are consistent with her unique strengths, abilities, and capabilities as required under the Rehabilitation Act. Appellant is a dynamic and talented seminar presenter. Her mobile style is one of her strengths and abilities. The Active is an occupational item of equipment, or tool, that is necessary for her to be able to achieve her capabilities and occupational goal as a successful seminar presenter.

Requirement of Informed Choice

The SSB's counselor's reliance on the recommendation of Mr. Tanner for the Edge was misplaced for two principal reasons. First, his recommendation was made without an adequate understanding of Appellant's "unique strengths, abilities and capabilities." Mr. Tanner's recommendation was made without the benefit of observing Appellant's dynamic method and style of speaking, interacting and walking about while presenting a seminar. Second, Mr. Tanner's testimony and written recommendation were based primarily on his personal experience, without regard to Appellant's needs and her "unique strengths, abilities and capabilities." For example, Mr. Tanner concluded that Appellant did not need access to all of the information Appellant utilizes in a Braille display during a presentation because he himself uses only an outline for his seminar presentations. Bases such as those are inappropriate and contrary to the requirements of the Act and Minnesota law. A targeted evaluation would have been appropriate and beneficial to all parties in Appellant's case.

⁷⁶ Findings 25, 26, and 28.

⁷⁷ Findings 31-34.

Inapplicability of Cost Comparison

SSB argued throughout the proceeding that the comparison of the cost of the Active compared to the Edge was a significant factor in its decision, and that it had already spent more money on Appellant than it would spend on average for the number of individuals that would potentially qualify for SSB services. Cost may be an appropriate factor if SSB were operating under an order of selection. However, it is not operating under an order of selection.

In addition, SSB relies on a provision of an SSB policy manual that states “services will be provided in a cost-effective manner.”⁷⁸ However, the operation of the plain language of Minn. R. 3325.0430 precludes considerations of cost comparisons for job-related services.⁷⁹ There is no ambiguity in the language of this provision. When the language is clear, no further inquiry or construction is required or permitted.⁸⁰ Finally, internal policies and procedures that conflict with a statute or rule may not be given effect.⁸¹ Therefore giving weight to the cost differential between the Active and the Edge is not appropriate for job-related services.⁸² SSB’s cost arguments fail in light of the plain language of the rule.

Conclusion

The Administrative Law Judge respectfully recommends to the Commissioner, under the relevant and reliable facts as applied to applicable law and rule, that he reverse the decision of the SSB and direct the purchase of an Active Braille reader for Applicant’s use in her occupation as a self-employed seminar presenter on the self care of health care professionals.

M. K. S.

⁷⁸ Ex. 6; Test. of N. Lemler.

⁷⁹ Conclusion 22.

⁸⁰ Minn. Stat. § 645.16 (2006), *Owens v. Water Gremlin Co.*, 605 NW.2d 733,737 (Minn. 2000).

⁸¹ See, *Builders Assn. of Minn. v. City of St. Paul*, No. A11-2270, 2012 WL 3023424 at *___ (Minn. App. July 23, 2012).

⁸² Conclusion 22.